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United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 760

TRENTON CHEMICAL COMPANY,
a Michigan Corporation,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

DICKINSON, WRIGHT, DAVIS, McKEAN
& CUDLIP,
SELDEN S. DICKINSON,
GLENN D. CURTIS,
Attorneys for Petitioner,
800 National Bank Building,
Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

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United States of America

IN THE

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OCTOBER TERM, 1952

No.....

TRENTON CHEMICAL COMPANY,
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vs.
THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Trenton Chemical Company, respectfully prays that a Writ of Certiorari issue to review the judg-

ment for the United States Court of Appeals for the Sixth Circuit, entered in this case February 7, 1953 (R. 79).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

The Court of Appeals for the Sixth Circuit affirmed the judgment of conviction on February 7, 1953. A petition for rehearing made by the Petitioner was duly entertained and denied April 1, 1953 (R. 101). An Order was entered April 8, 1953 staying mandate. This petition was filed within thirty days from the date of denial of petition for rehearing in accordance with the rules.

OPINIONS BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals (Martin, McAllister and Miller, J.J.) has not been reported and is printed in the Record at pages 80 to 85.

STATEMENT OF THE MATTER INVOLVED

The judgment of the Court of Appeals sought to be reviewed affirmed a judgment convicting the petitioner of violating Order 9915 allocating grain to distillers (12 F. R. 8879) and contrary to the provisions of Title III of the Second War Powers Act, 1942, as revived and reenacted by Public Law 395 of the 80th Congress (61 Stat. 945) (R. 3).

On March 27, 1942, Congress enacted the so-called Second War Powers Act, Title III of which provided, *inter alia*, as follows:

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the

United States will result in a shortage in the supply of *any material or any facilities* for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense * * *." (Italics ours.)

This part of the Act expired June 30, 1947.

Sometime in early December, 1947, Senate Joint Resolution 167 was introduced in the Senate and passed by it on December 18, 1947, and sent to the House. With some changes it was enacted and approved December 30, 1947, as Public Law No. 395 of the Eightieth Congress (61 Stat. 945).

The provisions of it pertinent to this case read as follows:

ANTI-INFLATION ACT

Chapter 526—Public Law 395
(S. J. Res. 167)

"Joint Resolution to aid in the stabilization of commodity prices, to aid in further stabilizing the economy of the United States, and for other purposes."

DECLARATION OF PURPOSES

"Section 1. The purposes of this joint resolution are to aid in stabilizing the economy of the United States, to aid in curbing inflationary tendencies, to promote the orderly and equitable distribution of goods and facilities and to aid in preventing maldistribution of goods and facilities which basically affect the cost of living or industrial production * * *.

* * * * *

"Section 4(b). Notwithstanding any other provision of law, Title III of the Second War Powers Act, 1942, is hereby revived and reenacted for the exercise of the powers, authority, and discretion conferred on the President by such Title III with respect to the use of *grain* for the production of distilled spirits or neutral spirits for beverage purposes. The authority granted by this subsection shall expire on January 31, 1948. (Italics ours.)

DELEGATION OF AUTHORITY

"Section 5. The authority granted to the President by Section 2 of this joint resolution and, notwithstanding the provisions of Section 6 of the Second Decontrol Act of 1947, the authority granted to the President by Section 4 of this joint resolution and by Section 6 of the Act of July 2, 1940 (54 Stat. 714), as amended, may, to the extent the President directs, be exercised by any department, agency, or officer in the executive branch of the Government."

On the same day the Act was passed and signed by the President, the Secretary of Agriculture issued Executive Order 9915 entitled "Grain Conservation—Allocation of Grain to Distillers." The pertinent provisions of this Order are as follows:

"(a) *Definitions.* (1) 'Grain' means corn, wheat, grain sorghums, barley, rye, granular wheat flour, granular rye flour, or any other grain or grain product used by a distiller in the manufacture of distilled spirits or neutral spirits for beverage purposes.

* * * * *

"(4) 'Wheat' means all classes of wheat and includes whole grain, grits, flakes, and starch material derived from wheat.

* * * * *

"(i) *Violations.* Any person who violates any provision of this order may, in accordance with the applicable procedure, be prohibited from receiving, making any deliveries of, or using grain, grain products, distilled spirits or neutral spirits. Any person who wilfully violates any provisions of this section is guilty of a crime and may be prosecuted under any and all applicable laws. Civil action may also be instituted to enforce any liability or duty created by, or to enjoin any violation of, any provision of this section.

* * * * *

"(m) *Effective date.* This section shall be effective from 12:01 a. m., December 31, 1947, to January 31, 1948, both inclusive.

(The Order is set forth in full on pp. 66-70 of Record.)

Late in the afternoon or evening of December 30th the Dept. of Agriculture sent telegrams to all distillers that the Grain Conservation Order would become effective at one minute after that midnight (R. 75).

The Secretary of Agriculture claimed that under the quotas allowed to distillers in the Order, Trenton Chemical Co., (referred to hereinafter as Trenton or Defendant) was entitled to use no grain or at most enough to run for about one day.

Trenton immediately filed a petition for relief which was denied by the Secretary, and immediately thereafter it filed a bill in the United States District Court alleging that the Act covered only grain and did not authorize the Secretary to include grain products in his Order and asked the Court to adjudge that the materials used by Trenton were not covered by the Act or Order and to enjoin the Secretary from interfering with its operations as long as it did not use grain (R. 19-22).

The Secretary had not entered an appearance or reply in the suit when the Order expired January 31, 1948, as the Order was effective for only one month, so on February 6, 1948, Trenton dismissed the case (R. 23).

On January 5, 1950, the Government filed a criminal information against defendant alleging that during the 31 day period covered by Act 395, it did knowingly, *wilfully*, and unlawfully use barley malt, malt syrup, and grain suspension (starch water) in violation of the Order and the Act (R. 3). On the same day a summons was issued to defendant charging it with violation of the Act (R. 4).

At the pre-trial hearing the defendant stated that it did, at the time and places charged in the information, use the materials alleged in the amounts alleged (R. 5). This left nothing to be determined except the question of whether or not this constituted a criminal offense. Defendant claimed that it did not, and asked the court to dismiss the information, or for a judgment of acquittal (R. 34). The trial court asked for a written statement, with citations of the statutes, orders, and authorities involved (R. 5). Defendant filed this on February 27, 1950 (R. 5). Subsequent briefs were filed by both sides. On October 30, 1950, the court orally denied defendant's motion and set the trial for November 7th. (Docket entries R. 1.) At the trial the defendant renewed its motion and the court again denied it (R. 35).

At the trial the court ruled that the Secretary had a right to define grain under the Act as including grain products; that the Government did not need to show that the defendant wilfully violated the Act; and that the only question of fact to be decided was whether or not any of the three materials used by the defendant were grain products (R. 49) (R. 57-59).

The only question of fact submitted to the jury was whether the malt, malt syrup, and starch water were grain products (R. 57-59). All government witnesses testified they were grain products, but none claimed they were grain. Defendant's witnesses testified they were not even grain products as they were so different from grain that they had identities of their own. This was the only disputed question of fact on which the court would permit testimony (R. 49, 50).

The court refused to permit the defendant to show the legislative history of the Act (R. 49), which included the facts that defendant's attorney had correspondence and meetings with the members of Congress and the committee having consideration of it in an endeavor to keep the words "grain products" and "grain derivatives" out of it (R. 7, 52, 54); that other legislation passed or pending had used the words "grain products" thereby showing that Congress knew of the distinction (R. 31).

The Court refused to permit the defendant to put in evidence to show that it acted in good faith and not wilfully (R. 49) which included meetings with Government officials at the Alcohol Tax Unit and that they permitted the defendant to continue to distill on the grounds that it was not covered by the Act or Order (R. 52); that defendant had filed the suit in Federal Court (R. 19) to get an immediate determination of the question (R. 51); that defendant had been advised by counsel that since the Act did not include grain products the Order of the Secretary including grain products was invalid and that the defendant could proceed to operate so long as it used only grain products and not grain (R. 53).

The Court refused to permit testimony on the purposes of the Act and Order, stating that the only question involved was whether defendant had used grain or grain products (R. 50).

The Court refused to permit defendant to show that the Government did not stop distilleries using molasses, an admitted food product (R. 51), or potatoes (R. 53). The Court refused the defendant the right to cross examine the Government's witness Schaeffer, who had helped draw the Order as to why he had included grain products in it (R. 54). The Court refused to permit defendant's witness to testify that the type of malt used by it was never sold for food purposes (R. 55). The Court refused to permit defendant to offer in evidence a contract dated October 18, 1947, requiring the manufacture of gluten by defendant for a period extending beyond January 31, 1948, offered for the purpose of showing that the starch water recovered as a by-product in the gluten manufacture would have to be made and would have to be destroyed if not made into alcohol (R. 56).

The Court charged the jury that both Act 395 and the Order made in pursuance thereof were valid; that the President had delegated his authority to the Secretary; that the Secretary had the right to define grain as including grain products (R. 57); that if the jury was satisfied the materials used were "grain as defined in the order" it should find defendant guilty; that the jury was not concerned with the word wilful as used in the information because if defendant used the materials with knowledge of the Order, it used them "wilfully" within the meaning of the word (R. 59). The Court refused to give nine of the defendant's requested instructions (R. 60).

The jury returned a verdict of guilty (R. 38), and the Court fined defendant $7,500.00 (R .39), stating that, "I do not want to invoke the full penalty, the full fine of $10,000.00, because I do not think there has been that degree of culpability. I think that Mr. Curtis, in advising his company, did advise the company in good faith" (R. 40).

Trenton then appealed to the Court of Appeals, alleging the Trial Court erred as follows: (Quoting from petitioner's brief filed therein.)

(1) The Court should have granted defendant's motion to dismiss because the Act covered only grain and defendant was charged with using malt, malt syrup, and starch water, none of which is grain.

(2) The Court should have granted defendant's motion to dismiss because the Order could not include grain products when the Act on which it was based covered only grain.

(3) If the Court was of the opinion that the word "Grain" was ambiguous enough to permit it to be interpreted as including grain products, it should have permitted defendant to show the purposes of the act and its legislative history for the purpose of showing that grain only and not grain products were intended to be covered.

(4) Since the Court held the Act and Order were valid, and defendant admitted violating them, the Court should have permitted the defeindant to show that it acted in good faith and not wilfully, as both the Act and Order required a wilful violation to be guilty of a crime, and this was a criminal proceeding.

(5) The Court erroneously refused to give defendant's requested instructions numbered 4, 5, 6, 7, 8, 9 and 13 (R. 47-48).

The Court of Appeals, 6th Circuit, in affirming the Trial Court, held that:

(1) Congress intended the word "grain" to include grain products, as a contrary construction would defeat the Act's purpose of conservation of grain,

so the Order did not enlarge upon the provisions of the Act (R. 83).

(2) There was no such ambiguity in the Act as to authorize the admission of evidence by appellant in its attempt to have the Act construed otherwise (R. 84).

(3) Even though the Act and Order required a "wilful" violation evidence of bad faith or evil purpose on the part of the defendant was not necessary, but it was sufficient if the prohibited act was intentional or voluntary (R. 85).

QUESTIONS PRESENTED

1. Can a court enlarge a criminal statute by construction so as to include a word or product not mentioned therein to carry out a supposed intention of Congress when such intention is not disclosed by the statute itself, and when the court holds the statute is not ambiguous enough to authorize the admission of evidence on the intent and purpose of Congress or the legislative history of the Act?

2. Can a court disregard the word "wilful" in a criminal statute or define it as being intentional or voluntary?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decision that a criminal statute can be enlarged by construction beyond its unambiguous provisions to carry out a Congressional intent not expressed, but in fact negatived, in the Act itself, without permitting resort to legislative history is in conflict with the decisions of the Courts of Appeal for the 3rd, 4th, 5th, 7th, 8th, 9th, and 10th

Circuits, the United States Emergency Court of Appeals, and probably in conflict with applicable decisions of this court.

The decision is such an important and drastic departure from the decisions of most other federal courts that if allowed to stand will cause utter confusion in the very important field of construction of criminal statutes in which field, above all else, there should be uniformity of judgments, as there should not be guilt in one circuit and innocence in another for the same actions under the same Act. One should be able to know from the reading of a plain and unambiguous statute whether certain actions are criminal or proper thereunder without waiting for a court construction that may vary with the judge, districts, or circuits.

Until 1944 the federal courts were uniform in holding that in a criminal statute the words "willful" and "willfully" required a showing of evil intent or bad purpose. Then the Court of Appeals in the Sixth Circuit in *O'Neal v. United States*, 140 F. 2nd 909 indicated that if defendant knew of the regulations his actions thereunder were willful, but cites no authorities.

In the same year the First Circuit in the case of *Zimberg v. United States*, 142 F. 2nd 132 held that doing a thing knowingly and deliberately was willful under a criminal statute, citing as its authority *United States v. Murdock*, 290 U. S. 389, and *United States v. Illinois Central R. Co.*, 303 U. S. 239.

The *Murdock* case, in discussing the word "willful" said it sometimes denoted that which is intentional, but *decided* that in a *criminal* case, even though it be a misdemeanor, there must be a showing of evil intent and bad purpose. The *Illinois Central R. Co.* case did not involve a criminal statute so its decision was not applicable.

In 1945 the Eighth Circuit in the case of *Kempe v. United States,* 151 F. 2nd 680 quoted and followed the *Zimberg* case. Since then the Second Circuit, in *United States v. George F. Fish, Inc.,* 154 F. 2nd 798; the Sixth Circuit, in *Gomila v. United States,* 159 F. 2nd 1006; and the Seventh Circuit, in *United States v. Perplies,* 165 F. 2nd 874; have cited and followed the *Zimberg* case, which was clearly wrong or at least in conflict with all previous federal decisions on the point.

In 1948 the Third Circuit, in *United States v. Klass,* 166 F. 2nd 373, and the Fifth Circuit, in *Alabama Packing Co. v. United States,* 167 F. 2nd 179 held no evil intent had to be shown but cited no authorities.

This leaves five circuits, the 1st, 2nd, 3rd, 6th, and 8th, defining "willful" contrary to and in conflict with the definitions given by four other circuits, viz., District of Columbia, 2nd, 9th, and 10th with the 5th and 7th doubtful as they have apparently conflicting decisions, as is pointed out in our attached brief.

The decisions of the *Zimberg* case and those that follow it are probably in conflict with applicable decisions of the Supreme Court, especially the *Murdock* case, *supra,* and *Screws v. United States,* 325 U. S. 91 as the courts are quoting dicta and comments therefrom rather than the actual decisions.

The words "wilfull" and "willfully" are omitted from many statutes and used in many others, so they must mean something and their meaning should be uniform.

The question of criminal intent was finally cleared up in felony cases by the decision in *Morissette v. United* States, 342 U. S. 246, but in misdemeanor cases, which are just as important, as there are more of them, the question

is in utter confusion as omission or use of the word "willful" usually determined whether or not criminal or bad intent was a necessary element to be shown.

To determine this question, which is of national importance, and to secure uniformity of judgments this writ should be allowed.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the proceedings of that court herein, being the case numbered and entitled in its docket as *"Trenton Chemical Company, Defendant-Appellant, v. United States of America, Plaintiff-Appellee,"* and that the judgment of that Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

TRENTON CHEMICAL COMPANY,
Petitioner,

By DICKINSON, WRIGHT, DAVIS,
McKEAN & CUDLIP,
SELDEN S. DICKINSON,
GLENN D. CURTIS,
Attorneys for Petitioner.

Dated: April 24, 1953.

United States of America

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THE UNITED STATES OF AMERICA,
Respondent

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

There was no opinion filed in the trial court. The opinion of the Court of Appeals has not been officially reported but is set forth on pages 80 to 85 of the record filed herewith.

JURISDICTION

Grounds on which the jurisdiction of this Court is invoked are set forth in the petition at page 2.

QUESTION INVOLVED

The questions involved are set forth in the petition at page 10.

STATEMENT OF THE CASE

A statement of the matter involved appears in the petition at pages 2-10, and in the interest of brevity is not repeated here.

ARGUMENT

Summary of Argument

No claim was made in the trial court that the statute included grain products but the court ruled that the Order was valid and that the jury was bound by the definition of grain in the Order (R. 59). The court gave no reason as to why the Order was valid. The Court of Appeals admitted the Order could be no broader than the Act, but held it valid on the ground the Act itself should be construed to include grain products to carry out the intention of Congress and to prevent evasion. The legal effect is the same as neither an administrative agency nor a court can enlarge a criminal statute. Petitioner contends:

1. The court could not enlarge this criminal Act because

(a) The Act was plain and unambiguous.

(b) No intention to include grain products was disclosed any place in the Act.

(c) No such intention was disclosed by testimony or legislative history as the court excluded such testimony.

2. The word "willful" in a criminal statute requires a showing that the acts were done with a bad purpose, evil intent, without justifiable excuse and without ground for believing them to be lawful.

General Argument

The Court of Appeal's holding in this case that the word "grain" could be enlarged to include grain products is in conflict with the decisions of several courts of appeal in other circuits and with applicable decisions of this Supreme Court.

Where the language of the statute is clear and unambiguous the courts may not add or take from its terms. *Tyson v. United States,* 76 F. 2nd 533, C. A. 4th.

Courts cannot enlarge or curtail acts of Congress. *Riverdale Co-op Creamery Assn. v. Commissioner of Internal Revenue,* 48 F. 2nd 711, C. A. 9th.

When language of a statute is plain and unambiguous there is no occasion to construe it and no justification for enforcing it otherwise than in accordance with its plain meaning. Courts have no legislative powers. Rules of construction, however, distinguish between civil and penal statutes; the former may be construed liberally; the latter must be construed strictly. *Braffith v. People of Virgin Islands,* 26 F. 2nd 646, C. A. 3rd.

In construing Act the courts have no power to legislate. *Kobilkin v. Pillsbury,* 103 F. 2nd 667, C. A. 9th.

The meaning of a criminal statute cannot be stretched. *Urbeteit v. United States,* 164 F. 2nd 245, C. A. 5th.

Statutory language that is sensible and unambiguous governs. *Warner v. Dworsky,* 194 F. 2nd 277, C. A. 8th.

It is language of statute which states rule by which those who read it must govern their conduct. If the language is clear and unambiguous and its effect is not un' reasonable, futile, or absurd, they are entitled to rely upon it and need not search the legislative records for a limitation which the members may have had in mind but which they did not express in their enactment. *Safeway Stores v. Arnall,* 196 F. 2nd 510.

The meaning of a word in a statute is properly determined by reading the language in question together with other sections of the Act. *Trathen v. United States,* 198 F. 2nd 757, C. A. 3rd.

Court has no power to enlarge a tax statute regardless of what it thinks the intent of Congress was as tax acts are strictly construed. *Foley Securities Corp. v. Commissioner of Internal Revenue,* 106 F. 2nd 731, C. A. 8th.

A court is not permitted to read into a criminal statute words which are not there. *Detrich v. Howard,* 155 F. 2nd 307, C. A. 7th.

A statutory offense cannot be established by implication, and there can be no constructive offense, and before an accused can be punished, his act must be plainly within the statute. *Arnold v. United States,* 115 F. 2nd 523, C. A. 8th.

No one may be required at peril of life, liberty, or property, to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands

or forbids. *Lanzetta v. New Jersey,* 306 U. S. 451; *Gorin v. United States,* 312 U. S. 19.

The rule that a criminal statute must be "strictly construed" means that no criminal offense may be created except by the words of Congress used in their usual and ordinary sense. There are no constructive offenses. *United States v. Alpers,* 338 U. S. 680.

The cases say that intent of Congress should be found in the words of the Act and it is only where this cannot be done that resort is had to legislative history.

If matters outside the wording of the Act did indicate that the intention of Congress was to conserve grain that intent could best be carried out by restriciting the Act to grain. While the matter was still pending in Congress Petitioner's attorney pointed out to members of Congress and the committee in charge of the bill that if grain products were not included spirits could be made from non-edible grain products such as used by it (R. 7). This argument undoubtedly had some effect on the Committee's decision not to include grain products in the Act.

Grain was not prohibited to distillers under either the Act or Order. The Order permitted use of millions of bushels of grain but was allocated to distilleries according to their previous use (R. 66-70, 75). Much of this allocated grain could have been saved if other distillers had switched to a non-edible grain product such as petitioner used. The court's statement in its opinion that even though the grain product used was non-edible the grain from which it was derived was no longer available as a food product (R. 83) is not true. The clears that petitioner bought for use of making gluten was a non-edible product left from wheat after the flour had been removed (R. 50), and from it petitioner extracted twelve per cent

of gluten, an edible product, thus increasing, not decreasing the food supply from wheat (R. 7). The by-product starch water used in the distillery was not edible (R. 56).

Therefore, there is nothing outside the Act or in its legislative history that shows Congress intended to include grain products, and if the purpose was to conserve grain it was even more clear that grain products should not have been included.

There is nothing in the Act itself that says its purpose was to conserve grain. It doesn't say so in the Title or in the Declaration of Purposes. Section 4, involved here, simply permitted the President to *allocate* grain used for the production of distilled spirits for beverage purposes. If the President thought there were critical shortages of any material, that was covered by Section 6 of the Act under which his power was limited to making recommendations to Congress. He could make no orders (61 Stat. 945)

If the intent and purpose was to alleviate shortages in "foods, agricultural commodities, and *products thereof*" (Note the Act used the word "products" when products were intended to be covered), Section 7 covered that, and again gave no authority to an administrative agency beyond the power to submit a program to Congress. No orders could be made. (61 Stat. 945)

To alleviate shortages in foods and feeds Section 8 gave the President power to carry out educational campaigns and make voluntary agreements. He could make no binding orders. (61 Stat. 945)

If this decision is allowed to stand it will have national significance in the laws relating to the construction of statutes, a very important field of law, as it removes

practically every restriction on a court's power to construe.

It holds that a court may extend and add to an unambiguous statute to carry out an intent the court thinks Congress had when that intent is not expressed therein. It holds that intent and purpose can be found outside the terms of the statute when testimony on the intent and purpose of Congress and legislative history has been excluded. It holds that a court can extend or add to a statute to prevent its evasion when Congress has not seen fit to do so. It holds that a court can add something it thinks Congress should have added. It holds that one may no longer rely on the plain and unambiguous words of a statute to determine whether or not his actions are legal but must wait for a judicial construction, with the rules of construction, if any are left, depending upon which District or Circuit he is in.

2. *The Court cannot disregard the word "willful" in a criminal statute or define it as being intentional or voluntary.*

We pointed out under our heading "Reasons Relied on For Allowance of the Writ" starting on page 10 of the foregoing petition that until nine years ago the federal courts uniformly held that the word "willful" especially in a criminal statute meant more than an intentional or voluntary act, and gave the history of cases that are departing from that rule because of following *Zimberg v. United States,* 142 F. 2nd 132, C. A. 1st, which was wrong because of an erroneous interpretation of *United States v. Murdock,* 290 U. S. 389 and *United States v. Illinois Central R. Co.,* 303 U. S. 239.

The *Murdock* case is the leading case on the word "willful" and devoted several pages to its discussion. It pointed

out that in some cases it denotes an act which is intentional, or knowing, or voluntary. The *Zimberg* case and those that followed it quoted this part of the decision, but the *Murdock* case said and *decided* that when used in a *criminal* statute there must be a showing that the act was done with a bad purpose, without justifiable excuse, or without grounds for believing it was lawful.

The *Illinois Central R. Co.* case was a civil penalty case, and not a criminal case and the *Zimberg* case and those that follow it overlook this.

Many Courts of Appeal correctly interpret and follow the Murdock case. We will quote from a few of them.

"The word 'wilfully', appearing in a statute as an element in the definition of a crime, has at times been held to imply more than mere knowledge of all the constitutive facts (*United States v. Murdock,* 290 U. S. 389); indeed it would be hard not so to read it, without writing it off as a rhetorical flourish." *United States v. Madole* (C. A. 2nd) 145 F. 2nd 466.

"If appellant, after taking all practical precautions to understand the regulations, honestly disagreed with what appellant knew to be the Administration's interpretation, and acted in accordanee with appellant's different interpretation in order that the question might be judicially decided, appellant was not a 'willful' violator of the regulation." (Citing *Felton v. United States,* 96 U. S. 699; *United States v. Murdock,* 290 U. S. 389; *Spies v. United* States, 317 U. S. 492; all being cases on which we rely) *Rainbow Dyeing and Cleaning Co. Inc. v. Bowles* (U. S. C. A.-D. C.) 150 F. 2nd 273.

When statute simply denounces doing of an act as criminal, especially in offenses mala prohibita, law im-

putes intent; but where statute denounces as criminal only its "willful" doing, specific intent, that is, actual knowledge of existence of obligation and wrongful intent to evade it, is of the essence (syllabus) *Hargrove v. United States* (C. C. A. 5th) 67 F. 2nd 820.

In *United States v. Kroger Grocery & Baking Co.*, (C. C. A. 7th) 163 F. 2nd 168 defendant was charged with knowingly and wilfully overcharging under O. P. A. price regulations. The court pointed out in footnote on page 172, that "the issue here is made dependent upon whether they (the overcharges) were intentionally made. *'Willful' as defined by the courts appears to be a word of broader scope than intentional"* (Italics ours.) The court further pointed out, on page 174, that "in a criminal prosecution wilfulness is an essential element to be alleged and proven by the government, while in a civil action the absence of wilfulness is a defense, with the burden of proof upon the defendant."

We claim this distinction is important. In the Order in our case the civil penalty did not require a willful violation, but the criminal penalty did, thus making a distinction in the Order itself, but the lower court, in effect, said there was no distinction (R. 5).

In *Wilton v. United States* (C. C. A. 9th) 156 F. 2nd 433 the Court approved the lower court's instruction as follows: "Doing or omitting to do a thing knowingly and wilfully implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. When used in a criminal statute, it generally means an act done with a bad purpose. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act."

In *One Buick Sedan v. United States* (C. A. 9th), 158 F. 2nd 445 the section of Internal Revenue Code applicable provided for a fine upon willful violation. Violation was admitted but the court said in setting aside the conviction: "To constitute a violation the act done must be 'wilful' in the sense of bad purpose. More is required than the mere doing of the act proscribed by the statute." (Citing several cases including *Screws v. United States,* 325 U. S. 91 and *United States v. Murdock,* 290 U. S. 389).

In *Dearing v. United States,* 167 F. 2nd 310, C. A. 10th the applicable section of the Interstate Commerce Act made it a misdeameanor to willfully neglect to make true entries in accounts. Upon conviction the defendant appealed on ground trial court had excluded proffered evidence tending to show his act was not criminally wilful. In reversing, the court said, "When the word wilfulness is used in a penal statute, more is required than the mere doing of the act proscribed. It generally means an act done with a bad purpose, without justifiable excuse."

The word "willful" is one of the most important words used in statutes, as shown by the fact that it has to be defined by the courts so often. To define it as "a word of many meanings" confuses rather than helps. Its definition should be definite, especially in criminal statutes.

In the record, beginning at page 87, in our Petition for Rehearing we have fully discussed this matter; have analyzed and discussed each case menioned in the opinion of the Court of Appeals in this case (R. 80-85) and we respectfully request the Court to read this and consider it part of this brief to avoid reiteration here.

The correct and uniform definition throughout the circuits of this important word is of national concern and importance.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

DICKINSON, WRIGHT, DAVIS,
McKEAN & CUDLIP,
SELDEN S. DICKINSON,
GLENN D. CURTIS,
Attorneys for Petitioner.